80-950

Supreme Court, U.S.
FILED
NOV 12 1980
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

GEORGE C. NICOLADZE, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

I.

WHETHER PETITIONER'S FIFTH AMENDMENT DUE PROCESS RIGHT TO AN ANBIASED GRAND JURY WAS VIOLATED BY THE STATEMENT OF THE PROSECUTOR TO THE GRAND JURY THAT THE CASE WOULD NOT BE PRESENTED TO THEM UNLESS THE I.R.S. AND THE JUSTICE DEPARTMENT WERE SATISFIED THAT, BEYOND A REASONABLE DOUBT, "THE INDIVIDUAL IS GUILTY".

II.

WHETHER PETITIONER'S SIXTH AMENDMENT RIGHT TO JURY TRIAL WAS IMPROPERLY IMPINGED UPON BY ADMISSION INTO EVIDENCE OF CERTAIN CHARTS, RESULTING IN A "TRIAL BY CHARTS".

III.

WHETHER PETITIONER'S RIGHT TO A FAIR TRIAL WAS VIOLATED BY THE ASKING OF IMPROPER IMPEACHMENT QUESTIONS TO CHARACTER WITNESSES.

INDEX

	Page
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Statement	3
Reasons for Granting the Writ . . .	7
Conclusion	17

Appendices

Memorandum, United States v. George C. Nicoladze, of Court of Appeals for the Ninth Circuit, affirming judgment of conviction . . . . . Appendix A

Page

Cases

United States v. Lewis,
482 F.2d 632, 639 (D.C. Cir. 1973) 16

United States v. Rintelen
235 F. 787 (1916) 12, 13

United States v. Samango,
607 F.2d 871 (9th Cir. 1979) 10, 11

Wood v. Georgia,
370 U.S. 375, 390 (1962) 8, 11

Codes

Devitt and Blackmar, Federal Jury
Practice and Instructions,
§ 33.03 (3d ed.) 15

Federal Rules of Evidence, § 405 6

United States Code

Title 18, § 3651 3

Title 26, § 2701 3

Title 28, § 1254(1) 2

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioner GEORGE C. NICOLADZE petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The opinion of the Court of Appeals (Appendix A, infra) is not reported and is not intended for publication. (Ninth Circuit Rules 21 (a) and (d).) The opinion was filed on October 22, 1980.

JURISDICTION

The opinion of the Court of Appeals

was entered on October 22, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

I.

WHETHER PETITIONER'S FIFTH AMENDMENT DUE PROCESS RIGHT TO AN UNBIASED GRAND JURY WAS VIOLATED BY THE STATEMENT OF THE PROSECUTOR TO THE GRAND JURY THAT THE CASE WOULD NOT BE PRESENTED TO THEM UNLESS THE I.R.S. AND THE JUSTICE DEPARTMENT WERE SATISFIED THAT, BEYOND A REASONABLE DOUBT, "THE INDIVIDUAL IS GUILTY."

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III.

WHETHER PETITIONER'S RIGHT TO A FAIR TRIAL WAS VIOLATED BY THE ASKING OF IMPROPER IMPEACHMENT QUESTIONS TO CHARACTER WITNESSES.

STATEMENT

After a jury trial in the United States District Court for the Northern District of California at San Francisco (the Honorable Robert F. Peckham, Chief United States District Judge), Petitioner was convicted of three counts of income tax evasion (26 U.S.C. § 2701).

On October 9, 1979 he was sentenced under 18 U.S.C. § 3651 to a "split sentence" -- six months in custody and thirty months suspended.

At the time the case was presented to the Federal Grand Jury, the following occurred:

> "During this investigation, Mr. Nicoladze made representations that certain monies that he had received from his clients were not taxable to him because they were contingent or conditional upon other things happening. He said certain clients would give him a fee and he would have to hold that fee, and it would not be income until he finished the services that he had rendered.
>
> "In questioning these various clients, no client supported that story. They all stated that the fees they paid to Nicoladze were fees for current services rendered and there was no agreement or understanding that any of the fees would be returned."
>
> . . . .
>
> A GRAND JUROR: Does it usually take this long, six years, to process

this type of tax evasion, or whatever it is? Is six years a normal time, or do you do it faster?

THE WITNESS [SPECIAL AGENT VENOR]: Investigations are very lengthy, and the review process, which these cases go to, takes a great deal of time. Cases are reviewed both locally and in the Department of Justice in Washington. It takes some period of time for them to return to the U.S. Attorney's office.

MS. SIMPSON [THE PROSECUTOR]: This case we received last month. The tax cases do follow a different route from most cases, as Mr. Venor pointed out.

After the Internal Revenue Service investigates a case, the Agent up through the District Director, decides to prosecute. It doesn't come directly to the U.S. Attorney's office, but rather to the Council for the IRS, and then they review the case to see if it meets the standards for prosecution. In other words, whether there's evidence or proof beyond a reasonable doubt, that the individual is guilty.

If the Local Council agrees that those standards are met, it's then forwarded to the Tax Division of the Department of Justice where attorneys for the Department of Justice again review the case for a determination to see whether those standards are, in fact, met.

Then it's forwarded to us. This case, we received last month with directions to present it to you.

(Tr., p. 10, 17-18, Grand Jury, April 11, 1979. Made part of record on appeal by Order, dated June 3, 1980.)

The grand jury indicted Petitioner the same day.

During presentation of its expert witnesses' testimony to the jury, the government had marked and presented to the jury certain schedules (Government Exhibits 64, 65, 66, 67). The jury was handed the exhibits, looked at them and testimony was adduced about them. Headings such as "Diverted Corporate Income", "Corrected Tax Liability", and "Unreported Income" were used on the exhibits. Defendant's counsel brought to the court's attention United States v. Abbas, 504 F.2d 123 (9th Cir. 1974), and the exhibits were stricken (RT 1546, 1552). The impact of summaries and charts upon the jury and the teaching of Abbas caused the trial court considerable concern:

> "Mr. Lyons: In making the comment with respect to the government, are you referring at all to --
>
> "The Court: I am referring to your failure to know about the Ninth Circuit case with respect to those surveys. I have explained that to you. How the tax division of the United States Attorney's office and the Internal Revenue Legal Division could bring a case without knowledge of that important decision

that affects the method of proof is something that I am afraid I cannot comprehend.

"There was not only a failure to conduct the necessary research, there also was the lack of support for you.

"I mean, that's the kind of a thing that someone in the Internal Revenue Service or in the Department of Justice in the tax division should pick up and alert these offices. To spend thousands and thousands of dollars on a prosecution and then perhaps commit prejudicial error simply because the case was not known is what I'm talking about.

"I don't think, in light of the total record -- but I want the transcript -- that it would in this case be prejudicial. You did not refer to it in the argument, and I did admonish the jury."

(RT 2148-2149)

The government's expert found a tax due and owing; the petitioner's expert found no tax liability.

On cross examination of government witnesses during the presentation of the government's case, defense counsel inquired as to defendant Nicoladze's reputation. (F.R.Evid. § 405.) The trial court permitted the question, even though presented "out of order" and the prosecutor was thus in a proper position to exercise his right

of cross examination of the character evidence.

The witnesses responded to the defendant's inquiry by asserting the defendant's excellent reputation. [E.g., government witness Doshier: "I'd say it was above -- if there is such a thing above excellent -- above excellent." (RT 874).] The prosecutor promptly cross-examined: "Would your opinion change if I suggested to you that on occasion Mr. Nicoladze lied under oath?" (RT 874). Prompt objection was made. The prosecutor's basis for the question was a deposition given by Nicoladze in a civil suit in Nevada in 1976. The deposition was admitted in evidence through witness Horton (RT 767-783). Whether Nicoladze had read it after transcription or had made any sworn acknowledgement to any attachment to it was not clear (RT 773-775, 780). Nor was the falsity of any statement made in the deposition clearly established.

REASONS FOR GRANTING THE WRIT

Grand Jury Misconduct: In effect, the grand jury was told that the IRS, the Justice Department and the United States Attorney believed

there was evidence beyond a reasonable doubt that defendant is quilty and that cases with less evidence will not be presented to a grand jury, due to the lengthy and careful review process. The grand jury had no opportunity to meaningfully evaluate any percipient witnes' veracity. It was not told of Nicoladze's contentions nor of the losses which would have raised substantive doubt as to any tax due and owing. Several witnesses at trial did not support the facts related by the IRS agent.

This court has pointed out on several occasions that one purpose of the requirement that an individual be indicted by a grand jury is to place between the prosecutor and the accused an independent body which can evaluate the evidence and determine if the charge is based upon reason. Wood v. Georgia, 370 U.S. 375, 390 (1962); Stirone v. United States, 361 U.S. 212, 218 (1960); Ex parte Bain, 121 U.S. 1 (1887). The accused has a right "to have the Grand Jury make the charge on its own judgment." Stirone v. United States, supra, at 219. "Neither by depriving the Grand Jury of its opportunity to evaluate the credibility

of witnesses, nor by making prejudicial remarks to sway the Grand Jury, may the prosecutor deny the accused this substantial right . . ." United States v. Gallo, 394 F.Supp. 310 (D.Conn. 1975).

To accept less than this as a right is unthinkable. Former Chief Judge Friendly of the Second Circuit Court of Appeals, said, with a hint of sarcasm: "When the framers of the Bill of Rights directed in the Fifth Amendment that 'no person shall be held to answer . . . unless on a presentment of an indictment of a Grand Jury', they were not engaging in a mere verbal exercise." United States v. Estepa, 471 F.2d 1132, 1136 (2d Cir. 1972).

There is no shield if the lay body of grand jurors is misled, misinstructed and misinformed by the accuser. There is no shield if the grand jury cannot hear evidence free from biased interpretation and argument, thereby corrupting its independence. "The very purpose of the requirement that a man be indicted by a Grand Jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge." Stirone

v. United States, 361 U.S. 212, 218 (1960). As a right wrung from kings and deeded to us as our heritage, we should guard it well, and maintain its vitality with our vigilance. The proceedings before the grand jury that returned this indictment are a challenge to our dedication.

A restatement of these principles has been made in recent decisions.

Honorable William G. Last, Senior United States Judge for the District of Oregon, wrote for the Court in United States v. Samango, 607 F.2d 871 (9th Cir. 1979):

> Although deliberate introduction of perjured testimony is perhaps the most flagrant example of misconduct, other prosecutorial behavior, even if unintentional, can also cause improper influence and usurption of the grand jury's role.
>
> Samango at 882.

> The cumulative effect of the above errors and indiscretions, none of which alone might have been enough to tip the scales, operated to the defendants' prejudice by producing a biased grand jury.
>
> Samango at 884.

> Neither by depriving the grand jury of its opportunity to evaluate the credibility of witnesses nor by making prejudicial remarks to sway the grand jury may the prosecutor deny the accused this substantive right.
>
> (Citing, United States v. Gallo), Samango at 884.

Samango's roots lie in the oft-cited case of Costello v. United States, 305 U.S. 359 (1956), which calls for an unbiased and independent Grand Jury. The Samango Court construed this premise to mean a jury free from the prejudicial effect of prosecutorial misconduct. The court in Wood v. Georgia, 370 U.S. 375 (1962), expanded upon Costello and required that an independent and unbiased Grand Jury also must be an informed Grand Jury.

In June, 1979, the Ninth Circuit Court of Appeals addressed the subject of a testifying prosecutor and said:

> The chief fear which underlies the ethical rules, it is commonly acknowledged, is not that the testifying prosecutor actually will overreach a hapless defendant, but that he will appear to a skeptical public to have done so. The legal profession's disapprobation of the advocate-witness is thus closely related to the injunction in Canon 9 of the ABA Code of Professional Responsibility that "[a] lawyer should avoid even the appearance of professional impropriety." Particularly where the lawyer in question represents the prosecuting arm of the Government, the ethical rule serves to implement the maxim that "justice must satisfy the appearance of justice." This function of preserving public trust may be especially necessary in proceedings of the grand jury, which more than

a few critics have characterized as a mere tool of prosecutors.

United States v. Birdman, 602 F.2d 547 (9th Cir. 1979).

Sixty years ago Judge Augustus N. Hand, then sitting in the United States District Court for the Southern District of New York, faced a question in United States v. Rintelen, 235 F. 787 (1916), directly related to the one before this Court. Although he found no injury done by the prosecutor's dispassionate review of evidence coupled with a recital of applicable law, Judge Hand referred with approval to standards enunciated some time before:

> "The limit of the District Attorney's duties is reached when he has explained the maning of the laws, laid before you all evidence in his hands officially, and aided in the examination of the witnesses. He should take no part whatever in your discussion as to guilt. The weight and credibility of the testimony is wholly for you, without even a suggestion from him. His opinion as to the sufficiency of the evidence to prove guilt should never be given, even if asked by a jury. His opinion in reference to the meaning of the law should never be withheld. Whether the facts are proved, he has no right to suggest even. The purpose of these instructions was to secure a fair independent

investigation by the Grand Jury . . ." (Emphasis added.)

United States v. Rintelen, supra, 793.

Unequivocably, and contrary to the spirit and intent of those instructions, the prosecutor here made a finding of guilt, judged the credibility of the witness, and pronounced the case proved. To compound the error, the "witnesses" never appeared before the jury and their credibility was never scrutinized by the grand jurors.

Trial by Chart: The Sixth Amendment guarantees to the Petitioner a right to jury trial. That right includes a protection against usurption of the petit jury's functions by a "trial by chart".

> "The use of this type of evidence, however, has inherent danger to an accused, for a jury is often unfairly and unduly impressed by the apparent authenticity of a government witness' chart computations, as such, rather than by the truth and accuracy of the underlying facts and figures supporting them. A trial court is charged with grave responsibilities in such instance to insure that an accused is not unjustly convicted in a 'trial by charts,' however impressive the array produced. Ordinarily, it would be the better practice, not so carefully observed in this instance, to required that the source of the facts and figures upon which such a chart is based by fully disclosed before its admission into evidence. Whenever possible, such charts should be confined

> in their preparation to strictly mathematical computations, subject to detailed explanation upon the trial by the testimony of expert government witnesses, and they should not be encumbered by such impressive, conclusionary captions as 'Overstatement of Merchandise Purchases', 'Overstatement of Delivery Expenses', 'Unreported and Undeposited Cash Receipts Invested in United States Savings Bonds', 'Unreported Net Income of Mr. E. C. Lloyd', 'Income Tax Unreported and Unpaid by Mr. Lloyd', such as were used on the Government charts here in dispute. While a prosecution witness may testify as to such conclusions from his mathematical computations, we think the danger in permitting the unrestricted use of such phrases upon charts results from a jury's natural tendency to accept such unsworn, conclusionary verbiage as authentic, primary proof, instead of purely in summarization and explanation of sworn testimony or autenticated documentary evidence.
>
> Lloyd v. United States, 226 F.2d 9 (9th Cir. 1955); quoted in United States v. Abbas, 504 F.2d 123 (9th Cir. 1974)1/

Improper Impeachment: The decision of the Court of Appeal ignores this Court's decisions in Michaelson v. United States, 335 U.S. 469 (1948), and Bronston v. United States, 409 U.S. 352 (1973).

1/ United States v. Gardner, 611 F.2d 770, 776 (9th Cir. 1980), confirming the court's power to allow the use of charts, does not detract from Abbas' reasoning and caution.

Michaelson approved the principle that specific acts of misconduct of the Petitioner may be inquired of upon cross examination of Petitioner's character witnesses. The inquiry re misconduct, however, must be made in good faith and the prosecutor must be prepared to furnish the basis for such questions.

However, the government's basis for such inquiry was that the deposition testimony was inconsistent with statements made by the defendant to IRS agents during the tax investigation. This is not a good faith basis for propounding a question about "lying under oath" -- i.e., perjury. At the least, the good faith basis for propounding such a question should include evidence of the standard three elements of perjury. [See: Devitt and Blackmar, Federal Jury Practice and Instructions, § 33.03 (3d ed.).] The prosecutor had no such good faith basis and the trial court was seriously concerned with the government's conduct (RT 1551).

The record is devoid of any evidence to establish which, if any, of the two statements involved was untrue. The prosecutor assumed for his

own purpose that the deposition testimony under oath was untrue, but this was never established. The deposition testimony under oath could have been true and the later unsworn interview statement to the IRS agent untrue. OR the latter statement could have also been true in the context in which it was given. Neither the preciseness of the questions at deposition nor at the IRS inquiry were established.

In order for the prosecutor to properly propound a question re "lying under oath" (perjury), the statement at deposition must be known to meet the standards required for perjury set forth in this Court's decision in Bronston v. United States, 409 U.S. 352, 357 (1973). This was not done. The prosecutor chose the exact characterization -- lying under oath -- and must, under Berger v. United States, 295 U.S. 78, 88 (1935), be responsible for the impact.[2/] That there exist "criminally fraudulent" statements or "false impressions" is not sufficient. Cf. Bronston, supra, at 358, n. 4.

2/ As an officer of the court, the prosecutor -- an experienced Assistant U.S. Attorney -- should have followed the procedures mentioned in United States v. Lewis, 482 F.2d 632, 639 (D.C. Cir. 1973), and Gross v. United States, 394 F.2d 216 (8th Cir. 1968).

CONCLUSION

The Petition should be granted.

DATED: November 20, 1980

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. GEORGE C. NICOLADZE, Defendant-Appellant.	)	No. 79-1740 D.C. No. CR79-0146-RFP M E M O R A N D U M

Submitted -- October 9, 1980

Appeal from the United States District court for the Northern District of California
Robert F. Peckham, District Judge, Presiding.

Before: KENNEDY, PREGERSON and POOLE, Circuit Judges.

Nicoladze appeals from his conviction of three counts of income tax evasion in violation of 26 U.S.C. § 7201.

His assignments of error concerning the government's presentation of the case to the grand jury, the government's attempted impeachment of character witnesses, the government's use of charts and summaries with allegedly improper headings, the government's alleged violation of his confrontational rights, the sufficiency of the evidence

APPENDIX A

of his guilt, and the propriety of the court's instructions are meritless.

The prosecutor's elaborate description of the process employed to decide whether to prosecute a tax case, although in response to a question asked by a grand juror inquiring into the reason for the delay in presenting the case to a grand jury, should as a matter of prudence and good judgment have been left unsaid. The error, however, did not meet the standard for prosecutorial misconduct set forth in United States v. Vargas-Rios, 607 F.2d 831 (9th Cir. 1979).

The evidence of Nicoladze's guild of the offense charged, if not overwhelming, was quite strong.

AFFIRMED.

No. 80-950

In the Supreme Court of the United States

OCTOBER TERM, 1980

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

QUESTIONS PRESENTED

1. Whether the prosecutor made improper statements which prejudiced the grand jury that returned petitioner's indictment.

2. Whether the government's use of charts and summaries during the testimony of its expert witness was proper in this prosecution for attempted tax evasion.

3. Whether the trial court correctly ruled that the prosecutor's attempted impeachment of two character witnesses did not warrant a mistrial.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 1

Argument 2

Conclusion 7

TABLE OF AUTHORITIES

Cases:

United States v. *Birdman*, 602 F. 2d 547, cert. denied, 444 U.S. 1032 3-4

United States v. *Bright*, 588 F. 2d 504 7

United States v. *Bruzgo*, 373 F. 2d 383 4

United States v. *Cole*, 617 F. 2d 151 7

United States v. *Collins*, 596 F. 2d 166 4-5

United States v. *Crippen*, 570 F. 2d 535 7

United States v. *Gardner*, 611 F. 2d 770 4

United States v. *John Bernard Industries, Inc.*, 589 F. 2d 1353 5

United States v. *Owen*, 580 F. 2d 365 4

United States v. *Polizzi*, 500 F. 2d 856, cert. denied, 419 U.S. 1120 ..... 3, 4

PREVIOUS PAGE WAS BLANK

Page

Cases—Continued:

United States v. *Prevatt*, 526 F. 2d 400 5

United States v. *Samango*, 607 F. 2d 877 4

United States v. *Skalicky*, 615 F. 2d 1117, cert. denied, No. 79-1866 (Oct. 6, 1980) 4

Statute and rules:

26 U.S.C. 7201 1

Fed. R. Evid.:

Rule 608(b) 7

Rule 1006 5

OPINIONS BELOW

The district court did not issue a written opinion. The memorandum opinion of the court of appeals (Pet. App. 1a-2a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 22, 1980. The petition for a writ of certiorari was filed on November 21, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Northern District of California, petitioner was convicted on three counts of attempted income tax evasion, in violation of 26 U.S.C. 7201 (Tr. 2140).[1] The district court sentenced him to three years' imprisonment, suspending all but six months on the condition that he serve five years' probation. The court further imposed court costs as part of the sentence imposed on Count One, and fined petitioner $1,000 on each count (Tr. 2205-2206). The court of appeals affirmed (Pet. App. 1a-2a).

The evidence adduced at trial showed that petitioner, a law school graduate, was engaged in the business of providing tax and financial planning services (Tr. 91-92, 1574-1575). He operated his business as a sole proprietorship until early 1973, when he began operating through a closely-held corporation to which he made a general assignment of all his income (Tr. 923-925). During the audit that led to the prosecution in this case, petitioner explained to revenue agents that he computed his income for tax purposes by depositing all of his income into his checking account, and

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[1] "Tr." refers to the trial transcript. "G. Exh." refers to the government exhibits introduced at the trial.

using his bank records to determine gross income by subtracting all non-income deposits made to the account (Tr. 41-42, 71). Examination of his bank records, however, disclosed a substantial discrepancy between petitioner's deposits and reported gross income, which he attempted to explain as non-income items, including loans and advance payments received from clients on a contingency basis for future services (Tr. 43-45, 74-81). Several clients, interviewed by the agents, contradicted petitioner's characterization of the payments and indicated they were for current services. In addition, the agents' investigation disclosed a substantial number of income checks which had been cashed by petitioner and were neither reflected in his bank deposits nor included on income lists provided by petitioner in the course of the investigation (Tr. 94-95, 926-944). This information was presented to the grand jury that returned petitioner's indictment.[2]

At trial, the evidence established that petitioner willfully failed to report income payments received from clients and other income on his individual income tax returns for 1972 and 1973 and on the return of his corporation for its taxable year ended January 31, 1975 (Tr. 1216-1256). The government employed the "specific items" method of proof, introducing direct evidence of checks and other non-cash payments received but not reported, to establish that petitioner had understated his individual and corporate taxable income for the three years by $30,467.38, which resulted in an underpayment of income tax liabilities of $5,583 (Tr. 1216-1254).

ARGUMENT

1. Petitioner contends (Pet. 7-13) that in presenting the case to the grand jury, the prosecutor made improper comments that rendered the indictment invalid. Specifically,

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[2]Transcript of the grand jury proceedings, at 6-15.

petitioner points to a remark by the prosecutor, near the close of the presentation of the government's evidence to the grand jury, made in response to an inquiry by a grand juror concerning whether the six-year processing time of this tax evasion case was typical. The prosecutor explained the review process for tax crime investigations, through IRS counsel and attorneys at the Department of Justice, to account for the time consumed before such a case comes to the United States Attorney. In this context, the prosecutor remarked that such a case goes through several stages of review to determine whether it meets the "standards for prosecution * * * whether there's evidence or proof beyond a reasonable doubt, that the individual is guilty."[3] No further discussion of the matter occurred; the prosecutor's explanation was followed by two unrelated questions by the grand jurors to the government's witness before the grand jury adjourned.

Petitioner suggests that these remarks alone amounted to prosecutorial misconduct that interfered with the grand jury's independent deliberative function. Petitioner implies, but does not actually assert, that the grand jury was prejudiced by these comments. However, only the most strained interpretation of the prosecutor's response to the grand juror's procedural inquiry could even remotely support the inference that her comments inadvertently biased the grand jury.

"[I]t takes very substantial evidence of grand jury bias for an appellate court to reverse a conviction because of an indictment returned by an allegedly biased grand jury." *United States* v. *Polizzi*, 500 F. 2d 856, 888 n.55 (9th Cir. 1974), cert. denied, 419 U.S. 1120 (1975). "[T]he federal courts have clearly established the principle 'that the dismissal of an indictment on the basis of governmental misconduct is an extreme sanction which should be infrequently

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[3]Transcript of the grand jury proceedings, at 17-18.

utilized.' " *United States* v. *Birdman*, 602 F. 2d 547, 559 (3d Cir. 1979), cert. denied, 444 U.S. 1032 (1980), quoting *United States* v. *Owen*, 580 F. 2d 365, 367 (9th Cir. 1978). In numerous cases treating allegations of prosecutorial misconduct far more substantial than that alleged here, the courts of appeals have refused to dismiss the indictment. See, *e.g.*, *United States* v. *Bruzgo*, 373 F. 2d 383 (3d Cir. 1967); *United States* v. *Birdman, supra.*

United States v. *Samango*, 607 F. 2d 877 (9th Cir. 1979), upon which petitioner relies (Pet. 10-11), is not to the contrary. There, the court sustained the dismissal of an indictment because of the cumulative effect of numerous errors and indiscretions by a prosecutor, none of which alone might have been sufficient, but which taken together exceeded the limits of acceptability and operated to prejudice the grand jury. Here, on the other hand, the prosecutor did not engage in the kind of repeated, egregious misconduct that might so prejudice a grand jury as to warrant reversal of an otherwise valid conviction rendered after a fair trial. Petitioner does not, and indeed could not, suggest that the prosecutor did anything calculated to discourage a thorough evaluation by the grand jury of the evidence, or that her innocent remarks had such an effect. While the prosecutor could have answered the grand juror's question in a less self-serving manner, petitioner has not demonstrated that this single remark raised a "reasonable inference of bias on the part of the grand jury." *United States* v. *Polizzi, supra*, 500 F. 2d at 887-888.

2. Petitioner also contends (Pet. 13-14) that the government improperly used charts and summaries in its examination of its expert witness. But the courts have uniformly upheld this method of proceeding. See, *e.g.*, *United States* v. *Skalicky*, 615 F. 2d 1117 (5th Cir. 1980), cert. denied, (No. 79-1866) (Oct. 6, 1980); *United States* v. *Gardner*, 611 F. 2d 770 (9th Cir. 1980); *United States* v. *Collins*, 596 F. 2d

166 (6th Cir. 1979); *United States* v. *John Bernard Industries, Inc.*, 589 F. 2d 1353 (8th Cir. 1979); *United States* v. *Prevatt*, 526 F. 2d 400 (5th Cir. 1976). See also Fed. R. Evid. 1006.

Prior to using the charts and summaries, the government had introduced the direct evidence of petitioner's unreported income and resultant tax liabilities upon which the charts and summaries were based, including checks and other records of payments as well as testimony by several of petitioner's clients and business associates. The expert extensively related the evidence already in the record upon which he based the conclusions reflected in the charts and summaries (Tr. 1216-1256). The court repeatedly instructed the jury as to the status and use of the charts and summaries (Tr. 1342, 2090-2091), warning the jury that they were not evidence in the case, but merely permitted to be used as a matter of convenience and to be disregarded entirely by the jury if they did not correctly reflect the facts and figures shown by the evidence in the case. Moreover, the jury was clearly advised that certain headings on these charts and summaries were only characterizations of the expert's opinion and not conclusive evidence (Tr. 1225, 1227, 1231, 1237, 2090-2091). On these facts, it is clear that petitioner was not prejudiced by the use of the charts and summaries.[4]

3. Finally, petitioner contends (Pet. 14-16) that the prosecutor's attempted impeachment of two character witnesses was improper and warranted a mistrial. The witnesses involved were two of petitioner's clients, initially called by the government to establish specific items of income (Tr. 845-877). Petitioner's counsel made them petitioner's own witnesses by asking each of them about petitioner's reputation in the community for veracity (Tr. 856, 874). During

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[4]Indeed, petitioner's own expert made similar use of such visual aids (Tr. 1855-1913).

questioning, both witnesses expressed their personal opinion as to petitioner's character, and the prosecutor asked them both whether their favorable opinions would be changed by knowledge that petitioner had lied under oath (Tr. 856-857, 873-876).

Petitioner claims that the prosecutor did not have a good faith basis for this questioning. The prosecutor's reference was to statements made by petitioner under oath in a deposition in a civil lawsuit. The deposition (G. Exh. 60) had been introduced (Tr. 775) into evidence by the government in this case in connection with two $2,000 checks (G. Exhs. 48A, 49A; Tr. 807, 822) received by petitioner from H. Roger Lawler. The agent who discovered the checks during his audit testified that petitioner had explained that the checks represented loans from Lawler used to capitalize two corporations for Lawler (Tr. 80-82). Lawler also testified that the checks represented loans for such purpose (Tr. 807-820). The government sought to cast doubt upon the credibility of petitioner's and Lawler's characterization of the checks in order to show that a portion of each check constituted income to petitioner. To that end, the prosecutor read to the jury (Tr. 769, 775) pertinent parts of a deposition (G. Exh. 60) taken from petitioner after his discussion of the checks with the revenue agent, in which petitioner had stated under oath that he had used his own funds to capitalize the corporations and specifically denied receiving any funds from Lawler for that purpose (G. Exh. 60, at 58-59, 87-88). Thus, at the time of the prosecutor's questions, the jurors had already been presented with evidence demonstrating that petitioner's deposition testimony was false, contradicted by evidence of petitioner's own acknowledgments to revenue agents, Lawler's testimony confirming the payments, and the checks themselves. Thus, the prosecutor's questions were entirely proper.

Petitioner's assertion (Pet. 16) that the prosecutor was required to possess a good faith belief that petitioner had committed all the elements of the crime of perjury is clearly erroneous (although it appears that the government indeed had demonstrated perjury). Rule 608(b) of the Federal Rules of Evidence permitted the prosecutor to ask questions of character witnesses concerning "specific instances of conduct" relevant to petitioner's veracity. It is irrelevant whether such conduct constitutes a crime. See *United States* v. *Cole*, 617 F. 2d 151, 153-154 (5th Cir. 1980); *United States* v. *Bright*, 588 F. 2d 504, 511-512 (5th Cir. 1979); *United States* v. *Crippen*, 570 F. 2d 535, 538-539 (5th Cir. 1978). There was ample evidence before the court and the jury to establish a reasonable basis for the prosecutor's question.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1981